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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

D.N.R.C.

GOLLAHER RANCH CO., MYRLE)	Cause No. CDV-05-770
GOLLAHER and DELIGHT GOLLAHER,)	
Petitioners,)	ORDER RE: PETITION FOR JUDICIAL
)	REVIEW AND REQUEST FOR RECEIPT
and)	OF ADDITIONAL EVIDENCE
)	
JAMES D. PRIBYL and MARJORIE)	
PRIBYL and THE MONTANA)	
DEPARTMENT OF NATURAL)	
RESOURCES AND CONSERVATION,)	
Respondents)	

This is a *Petition for Judicial Review of DNRC Decision, and Request for Receipt of Additional Evidence* arising out of an administrative decision in which Petitioners, Gollaher Ranch Co. and Myrle and Delight Gollaher, challenge the issuance of permits by the Department of Natural Resources and Conservation to the Respondents James and Marjorie Pribyl for construction of stock ponds.

The matter has been fully briefed and the Court has heard oral argument. At oral argument, the issue of the receipt of additional evidence was withdrawn.

I. BACKGROUND

Respondents James and Marjorie Pribyl constructed two stock ponds on their property in the Willow Creek drainage, Section 29, T17N, R1E and Section 6, T16N, R1E. Myrle and Delight Gollaher, who along with Gollaher Ranch Co. are the Petitioners, contacted the Montana Department of Natural Resources and Conservation (hereafter "Department") in Lewistown about the Pribyls' stock ponds. The Lewistown office contacted the Pribyls who then filed for a Provisional Permit for a Completed

Stockwater Pit or Reservoir under §85-2-306 MCA on April 25, 2003. On May 19, 2003, the Pribyls received stockwater permits 41 QJ 30006070 and 41 QJ 30006071 with a priority date of April 28, 2003. Permit No. 6070 applies to the pond known as the "Lower Pond" whereas Permit No. 6071 refers to the pond called the "Upper Pond."

The permit for the Lower Pond allows the Pribyls to appropriate up to 5.00 acre-feet of water per year from Willow Creek. The permit for the Upper Pond allows the Pribyls to appropriate up to 11.20 acre-feet of water per year from an unnamed tributary of Willow Creek. The period of diversion and period of use for each pond is January 1 through December 31 of each year.

Petitioners have a senior, existing water use from an approximately 800 acre-foot reservoir located downstream from both of Pribyls' ponds and use the reservoir to store water from Willow Creek to water stock and irrigate. Petitioners' period of use for irrigation is April 1 through September 30.

Pribyls have installed a head gate to divert water from Willow Creek to each pond. The gates leak when they are closed. They can be modified to prevent leaks or the water that seeps through the closed gates can be returned directly to Willow Creek. In April 2004, it took five days from the time the Pribyls closed the lower headgate for the water to flow into the Gollaher Reservoir.

Willow Creek is non-perennial in nature. The creek flows above-ground usually during spring runoff or as a result of local precipitation. The Department found that when the flow on the surface of Willow Creek is not continuous, not all of the water diverted upstream by the Pribyls would reach the Gollaher Reservoir even if it were not diverted.

Willow Creek also runs through the properties owned by Glen Kitson and Gary Salo who hold water rights senior to the Pribyls. Kitson has irrigation and stockwater use that is between the Upper and Lower Pond. Salo appropriates water directly from

Willow Creek downstream of the Lower Pond. Willow Creek runs through Kitson's and Salo's property between March and July. If Pribyls divert water to their ponds, neither Kitson nor Salo will fulfill his senior water right. The Pribyls intend to divert water during the "off season" when diversion will cause little impact on downstream appropriators.

Petitioners made a call for water from the Pribyls and sent a copy of the call for water to the Lewistown Water Resources Regional Office which received it on March 23, 2003. On April 28, 2003, Scott Irvin, the Regional Manager of the Lewistown office, inspected the Pribyls' ponds. Irvin found that the means of diversion for the two ponds was a headgate and a ditch not a pit as originally stated on the permit that the Department automatically issued upon application. In addition, the total appropriation for the Upper Pond was actually 22.88 acre-feet rather than the stated 11.20 acre-feet in the initial permit. The total appropriation for the Lower Pond is 3.4 acre-feet rather than the 5 acre-feet as permitted in the permit.

In a letter dated May 2, 2003 to Petitioners' counsel, Irvin wrote that he did not find any indications that the Pribyls were not in compliance with §85-2-306 MCA (2003) when he inspected the ponds on April 28, 2003. On May 15, 2003, the Petitioners filed a formal, statutory complaint with the Department and asked for a hearing pursuant to §85-2-306(3) MCA (2003). In this complaint, the Petitioners asked the Department to require the Pribyls "to modify both of their impoundments to prevent leakage and to insure that stream runoff and reservoir overflow is directed back to the true Willow Creek creek bed."

The Department issued a *Notice of Stock Water Permit Hearing and Appointment of Hearing Examiner* on May 21, 2004 which set the hearing that Petitioners requested for July 28, 2004. According to the *Notice*, the issue before the Department was "whether rights of other appropriators have been or will be adversely affected, and if so, whether the Department should revoke the permits subject to terms, conditions,

restrictions, or limitations that it considers necessary to protect the rights of other appropriators."

Hearing Examiner Charles Brasen issued a *First Prehearing Order* on May 25, 2004. Per the *Order*, a telephonic scheduling conference was held on June 3, 2004. In a supplemental prehearing order, Brasen identified the issues before the Department as:

1. adverse water rights of other appropriators as set out in §85-2-311(b) MCA;
2. whether the source in question is a non-perennial stream as set out in §85-2-306(3) and
3. which party bears the burden of proof in this matter.

On July 23, 2004, Brasen issued a *Prehearing Order on Burden of Proof*. The parties had fully briefed the matter. In this *Order*, Brasen found that the burden of proof was on the Petitioners.

The hearing was held as scheduled on July 28, 2004. Brasen issued a *Proposal for Decision* on September 23, 2004. Both parties filed exceptions to the findings of fact and conclusions of law in the *Proposal for Decision*. Oral argument on this matter was held on February 11, 2005 in front of Hearings Officer Mary Vandebosch.

Vandebosch issued the *Final Order* on June 8, 2005. Including a discussion of the exceptions submitted by both parties, the *Order* allowed the water permits to stand with certain limiting conditions. It is from this *Final Order* that Petitioners have brought this contested case before this Court for judicial review.

In their *Petition for Judicial Review*, the Petitioners state the following grounds for revocation or at the very least, amendment of the permits:

1. the Department erred when it concluded that the Petitioners bore the burden of proof;
2. the Department erred when it failed to consider the timeliness, correctness and completeness of the Pribyls' Permit Application;
3. the hearing itself was untimely;
4. the Department erred when it failed to require inspection as one of the conditions of the amended permits;

5. the Department erred when it excluded certain evidence from the hearing;
and
6. the Department acted incorrectly, erroneously and arbitrarily when it made certain findings of fact and conclusions of law.

II. Standard of Review

The standard for judicial review of an agency's decision under the Montana Administrative Procedure Act is found at §2-4-704 MCA. This section provides that:

- “(1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
- (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
- (a) the administrative findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
 - (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
 - (b) findings of fact, upon issues essential to the decision, were not made although requested.”

§2-4-704 MCA. In reviewing conclusions of law, this Court must determine if the agency's interpretation of the law is correct. *Steer Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). In reviewing findings of fact, the Court must determine whether the findings are clearly erroneous. *Id.* See also *Quick v. Bozeman School District*, 1999 MT 175, ¶18, 259 Mont. 240, ¶18, 983 P.2d 402, ¶18 (1999); §2-4-704(1)(a)(vi) MCA. The reviewing body may not substitute its judgment for that of the fact-finder as to the weight of the evidence on questions of fact. *Quick* at ¶22.

In cases where an agency issues a proposal for order and serves it on the parties, the agency must also give the parties the opportunity to file exceptions to the proposal for order and present briefs and oral argument before rendering a final decision. §2-4-621 MCA. The Court has held that "[i]t is a general principle that if an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review." *Barnicoat v. Comm'r. of Dept. of Labor and Indus.*, 201 Mont. 221, 225, 653 P.2d 498, 500 (1982).

Thus, only a person who has exhausted all administrative remedies available within the agency and is "aggrieved by a final decision in a contested case is entitled to judicial review." *Shoemaker v. Denke*, 2004 MT 11, ¶19, 319 Mont. 238, ¶19, 84 P.3d 4, ¶19 (2005). Therefore, if a party fails to raise an exception to the contents of a proposal for order, it has failed to exhaust its administrative remedies. *Stone v. Belgrade School Dist.*, 217 Mont. 309, 313, 703 P.2d 136, 138-139 (1984). The purpose of the exhaustion doctrine is to "allow a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes." *Shoemaker* at ¶18 (citation omitted). The only issue to which the exhaustion doctrine does not apply is a constitutional issue. *Shoemaker* at ¶ 20.

III. Discussion of Issues Presented

1. Burden of Proof

As a conclusion of law, the Court reviews the Department's decision for correctness. Petitioners have argued that the Pribyls bear the burden of proof to show that their permits were properly issued under §85-2-306 MCA (2003) contrary to the Department's conclusion.

Section 85-2-302(1) MCA sets out the general process a party must follow to apply for a water permit. This section specifically exempts section 306 from its sphere.

§85-2-302(1) MCA. Section 85-2-311 MCA lists the criteria used for issuance of a permit according to Part 3 of Chapter 2, Title 85, namely §85-2-302 MCA. Section 85-2-311 MCA places the burden of proof squarely on the applicant to fulfill the lengthy criteria. §85-2-311(4)(c) MCA. In addition, §85-2-402(6)(b) MCA, which governs changes in appropriation rights to permits issued pursuant to §85-2-302 MCA, also places the burden of proof squarely on the applicant requesting the change.

However, section 306 contains its own specific criteria for issuing a permit, its own method of challenging a permit as well as the remedies the Department is authorized to order. The permit is issued automatically if it meets the criteria. The Department may then revoke or modify the permit after a hearing. §85-2-306(3) MCA (2003). The section does not specifically designate which party bears the burden of proof at a hearing. However, the Court must note that section 306 does not directly require the applicant to affirmatively act beyond filing a permit application.

The Supreme Court presumes “that the legislature enacts a law with full knowledge of all existing laws on the same subject...” *Blythe v. Radiometer America, Inc.*, 262 Mont. 464, 475, 866 P.2d 218, 225 (1993). Because the Legislature exempted section 306 from the requirements of sections 311 and 402, the Court concludes that section 306 was enacted with the Legislature’s full knowledge of these two sections. If the Legislature had explicitly wanted to place the burden on the permittee under §85-2-306 MCA, it would have drafted the statute that way. That the Legislature chose not to explicitly include this issue in §85-2-306(3) MCA (2003) does not allow this Court to insert the language of sections 311 or 402. §1-2-101 MCA.

Furthermore, when a general and particular provision are inconsistent, the latter is paramount to the former, so “a particular intent will control a general one that is inconsistent with it.” §1-2-102 MCA. See also §1-3-225 MCA. Since the specific governs the general, the Court concludes that the specific terms of §85-2-306 MCA

(2003) show that it is a stand-alone section and should not be analyzed in conjunction with sections 302, 311 and 402. See §1-3-225 MCA. The Court must look to other sources to determine which party bears the burden of proof.

Section 26-1-401 MCA states that “[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side.” The subsequent section, §26-1-402 MCA, provides that “[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.” The Court finds these general provisions regarding the burden of proof in civil matters persuasive.

Petitioners cite to *Whitcomb v. Helena Water Works, Co.*, 151 Mont. 443, 444 P.2d 3001 (1968) and *Application for Appropriation of Water Rights for Royston*, 249 Mont. 425, 816 P.2d 1054 (1993) to support their position. The Court finds these cases unpersuasive. In *Royston*, the Roystons wished to amend their water right under §85-2-402 MCA. As discussed above, section 402 does not apply to section 306.

In *Whitcomb*, the action was brought under section 89-1015, R.C.M.1947 to determine whether or not the Helena city water commissioner was distributing the water in accordance with the decree issued in 1903. *Id.* This code section provided a summary remedy for a water right owner on an adjudicated stream who was dissatisfied with the method of distribution employed. 151 Mont. at 446, 444 P.2d at 303. This case relies on a Code section that was in place before the Water Use Act of 1973 and does not appear to involve the issue of which party bears the burden of proof in such cases.

However, in an administrative proceeding before the Montana Department of Environmental Quality (MDEQ), the Montana Environmental Information Center (MEIC) asserted that the MDEQ's decision to issue an air quality permit to a developer to build a coal-fired plant violated Montana law. *Montana Environmental Info. C'tr v. Montana*

Department of Environmental Quality, 2005 MT 96, ¶16, 326 Mont. 502, ¶16, 112 P.3d 964, ¶16 (2005). Section 75-2-211 MCA allows the MDEQ to issue air quality permits and provides that “[w]hen the department approves or denies the application for a permit under this section, a person who is jointly or severally adversely affected by the department’s decision may request a hearing before the board.” §75-2-211(10) MCA.

MEIC contested the issuance of the permit which was upheld by MDEQ after a contested case hearing; MEIC then submitted the decision for judicial review. *Id.* at ¶8. The District Court, contrary to MEIC’s assertions, found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. *Id.* at ¶11. Citing to §§26-1-401 and 402, the Supreme Court found that “the party asserting a claim for relief bears the burden of producing evidence in support of that claim.” *Id.* at ¶14 (citing *Wright Oil & Tire Co. v. Goodrich*, 284 Mont. 6, 11, 942 P.2d 128, 131 (1997)). The Court agreed with the District Court and held that MEIC had the burden of proof in the contested case proceeding. *Id.* at ¶16. The Court finds this case more persuasive in light of the statutory language used in both section 306 and §75-2-211(10) MCA.

In a brief aside, Petitioners refer to §85-2-305 MCA as support for their contention that people who “construct and maintain reservoirs” bear the burden of proof with regard to the rights of prior appropriators. As discussed above, section 306 applies only to stock ponds that are clearly defined under the terms of the statute. Thus the analogy to a reservoir does not hold water. Furthermore, §85-2-305 MCA provides that “[a] person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this chapter.” As discussed above, section 306 is stand-alone with regard to its application and hearings process. The rest of the chapter, with regard to permitting processes, does not apply to it.

In this case, the Petitioners initiated the challenge and would have suffered a finding against them in the absence of evidence. Based upon the language of §85-2-306 MCA, the foregoing case law and statutory authority, the Court finds that the Department's determination that the Petitioners bore the burden of proof with regard to their challenge to the permits is correct.

2. Timeliness, Correctness and Completeness of Permit Application

Petitioners argue that the Department should not have issued the permits because they were not filed in a timely manner nor were they correct or complete. The Department found that the Petitioners' request to void the permits on these grounds was not properly before it since it had not been raised prior to the submission of their exceptions to the proposed order. In their *Reply Brief*, the Petitioners contend that they properly raised the issue of the timeliness, completeness and correctness of the Pribyls' permit applications during the contested hearing which was sufficient to put the issue properly before the Department. As such, Petitioners ask that the permits should be declared invalid.

The Supreme Court has held that "[a] plain reading of § 2-4-702(1)(b), MCA, indicates that a party may question the validity of a statute for the first time on judicial review to the district court. Other than that exception, all other issues must be raised at the administrative level absent good cause." *Hilands Golf Club v. Ashmore*, 2005MT 8, ¶21, 308 Mont. 111, ¶21, 39 P.3d 697, ¶21 (2005)(emphasis added). The Supreme Court has recognized that limited judicial review "strengthens the administrative process" and encourages parties to present a full and complete case to the agency "by penalizing those who attempt to add new evidence or new lines of argument at the judicial review level." *Vita-Rich Dairy Inc. v. Department of Business Regulation*, 170 Mont. 341, 343-344; 553 P.2d 980, 982 (1976).

By failing to raise an issue before an agency during a contested case proceeding, a party does not fulfill the "statutory mandate" of §2-4-702 MCA by failing to exhaust its administrative remedies. *Wilson v. Department of Pub. Serv. Regulation*, 260 Mont. 167, 172, 858 P.2d 358, 371 (1993). If a party has failed to exhaust its administrative remedies, any new issue it raises in a petition for judicial review is not properly before the Court. §2-7-402(1)(b) MCA.

The Court notes that the Petitioners did not list the permitting issue in their initial complaint. In addition, the matter was not identified as an issue in the notice of hearing or in the *Order Supplementing First Prehearing Order*. However, Petitioners point to their witness list submitted prior to the hearing in which they state that Scott Irvin would testify as to the issuance of the permits.

The Petitioners also point to various parts of the hearing transcript. In their opening statement, counsel for Petitioners states: "[a]nd with respect to the upper pond we will show that the application was not complete, is still not complete or correct." HT, p. 13, ll. 6-7. With the exception of this statement, the rest of Petitioners' opening statement refers to adverse effect.

During James Pribyl's testimony, the permits were introduced as evidence and Pribyl was questioned as to their contents. HT, pp. 32-33. In particular, James Pribyl, on cross-examination, answered questions about when a permit must be filed and when a stock pond is considered to be complete. HT, p. 32, l. 14-p. 33, l. 8. Leonard Moug testified that there were no springs in the Upper Pond. HT, p. 66, l. 3. Irvin was questioned at length about the evolution of the permits, the changes made to the permits and the work performed by his office. HT, pp. 139-159. Petitioners lastly point out Hearing Examiner Brasen's Conclusions of Law 1 and 10 regarding the issue of whether the permits were correct and complete.

The Court disagrees with the Petitioners that the totality of the references in the witness list, opening statement, discussion of the permits at hearing and proposed order is sufficient to put the Department and the Pribyls on notice as to this issue. The Court must note that at the outset of James Pribyl's examination counsel stated that "[a]nd it appears that permitting is actually not at issue here. So let's just talk about adverse impact..." HT, p. 139, l. 12-13. Petitioners made no objection, motion or response to this statement.

Laying the foundation for a crucial exhibit does not constitute raising an issue for adjudication. Discussing the terms of the permits, the cause and focus of the entire process, also fails to raise the permitting issue. The issue before the Department was adverse effect. The Department needed to know the contents of the permits as well as how and why they changed in order to make its finding and conclusions. That the Hearing Examiner made a proposed conclusion of law which was struck by the Hearings Officer does not show the Pribyls were on notice of the permitting issue.

The citations to the record are insufficient to support Petitioners' argument that they properly raised the permitting issue before the Department. The Department's decision on this matter is correct and this matter is not properly before the Court.

3. Timeliness of Hearing

Petitioners allege that the contested case hearing was set for July of 2004, over a year from their initial complaint. Petitioners look to §85-2-309 MCA to support their contention that a hearing must be held within 60 days of an objection to a permit.

However, Petitioners never raised the issue of timeliness of the hearing before the agency or in their exceptions and may not raise it for the first time on judicial review. As such, the Court will not address it since it is not properly before the Court.

Even if the issue were properly before the Court, section 309 provides that "[i]f the department determines that an objection to an application for a permit or change

approval under 85-2-402 states a valid objection, it shall hold a contested case hearing...within 60 days from the date set by the department for the filing of objections.” §85-2-309 MCA (emphasis added). Since this Court has determined that section 402 does not apply to section 306, the Court finds this argument unpersuasive. Section 306, while specifically providing for a hearing, does not set out a timeline for that hearing to occur. Thus, the hearing was not untimely.

4. Inspection

Petitioners assert that the Department arbitrarily and erroneously failed to provide for inspection as one of the conditions of the amended permits. In support of their argument, the Petitioners cite to the Department's allegedly improper reliance on *Raymond v. Wimsette*, 12 Mont. 551, 31 P.537 (1892) and to *Application of DeBruycker*, Case No. 58133-s410, 11/4/88 for the proposition that an inspection requirement is necessary.

The Court notes that the *Raymond* does not concern the issue of inspection and that it appears that the Department did not apply the case to that issue. It deals with whether the natural flows of a creek could reach a downstream appropriator absent diversion by the upstream appropriator and whether sufficient evidence in the particular case had been presented. 12 Mont. at 551, 559, 31 P. at 540. It is not a case about inspection. The *DeBruycker* case deals with the denial of an application under sections 302 and 311 and discusses the logistical difficulty of operating the applicant's plan to comply with the proposed permit. Conclusion of Law No. 4. It does not state that an inspection requirement is mandatory.

The Code does not allow the Department the right to impose a *de facto* or *de juris* easement on a landowner so that other landowners may inspect without prior notice. Section 85-2-115 governs compliance with water law and water permits. It allows the Department to make reasonable inspections to enforce water laws. The

requested remedy of mandatory inspection is beyond the scope of the agency's authority.

Furthermore, in light of the detailed consideration of the testimony evident in the stated conditions and the Department's requirement that the Pribyls "contact prior appropriators as necessary to comply with the permit conditions," the Court finds the condition is a reasonable remedy in light of the evidence and is not a misapprehension of the evidence. The Department's decision to omit mandatory inspection is not "random, unreasonable or seemingly unmotivated, based on the existing record." See *Final Order*, Condition F.

5. Exclusion of Evidence

Petitioners contend that evidence regarding the need for inspection, beneficial use and legal availability of water was wrongly excluded. In this argument, they also assert that the Department erred because it failed to correct alleged mathematical errors on the permits. Since the Court has already determined that the condition of inspection was beyond the Department's scope to award, any alleged error on this point is moot.

Pursuant to § 2-4-612(1), MCA, "[o]ppportunity shall be afforded all parties to respond and present evidence and argument on all issues involved." Therefore, only evidence that relates to the issues properly before the agency is relevant and admissible.

a. *Legal Availability*

During the hearing, Brasen stated that the issue of availability was not at issue. HT, p. 126, ll. 1-3. Petitioners contend that this decision was incorrect and that evidence to support the issue of legal availability of water was erroneously excluded. Petitioners assert that the issue of legal availability is a basis to challenge the permit on

the ground of adverse effect. The Court finds that the Department correctly excluded this evidence.

While §85-2-311 MCA does not apply to §85-2-306 MCA, it is still helpful to review section 311 to see how the Legislature has defined “legal availability” and “adverse effect,” both of which are terms of art within the water code. “Legal availability” is listed as a criterion for issuance of a permit and is defined by the Legislature in the same section. §85-2-311(1)(a)(ii) MCA. The definition does not reference “adverse effect” on other appropriators. *Id.* In §85-2-311(1)(b) MCA, the Legislature has included “adverse effect” as a separate criterion for the issuance of a permit and has included an explanation of its meaning in section 311. Therefore, the Legislature has differentiated the two terms of art and has constructed legislation that does not conflate the two concepts. Legal availability is not contained within adverse effect. As such, legal availability is not relevant to this case.

If the Legislature had wanted to include legal availability as a ground for contest under section 306, it would have done so. The Department acted correctly when is declined to allow testimony regarding legal availability into evidence.

b. Beneficial Use

In a similar analysis, the Court looks to §85-2-311 MCA to define the term of art “beneficial use.” In subsection (1)(d), the term “beneficial use” is listed as a separate criterion and does not include language regarding adverse effect. Based on the above analysis, “beneficial use” is not contained within the definition of “adverse effect.” The two terms of art are separate and distinct. Furthermore, the Court notes that the Petitioners never raised the issue of beneficial use prior to hearing and, as such, it is not properly before this Court.

In any case, since the sole, stated ground for contesting permits under §85-2-306(3) is adverse effect, the Court finds that the Department was correct when it excluded any testimony regarding beneficial use.

c. *Mathematical Calculation*

The Petitioners allege in their initial brief that the *Final Order* was “patently wrong” because it failed to correct the Hearings Examiner’s calculation of the water allocation in the Lower Pond. The actual, total appropriation stated in the *Final Order* for the Lower Pond is 3.4 acre-feet but the permit allows 5.0 acre-feet in Condition A. It appears that Finding of Fact No. 7 is also at issue. In the *Proposal for Order*, Condition A allowed 3.4 acre-feet.

Petitioners have asked for this change because the Department did not determine whether the Pribyls could “only put this amount to beneficial use...” *Brief in Support of Amended Petition for Judicial Review of DNRC Decision, and Request for Receipt of Additional Evidence*, p. 21. However, the Court has already ruled on the relevance of beneficial use. The Department may only revoke or amend a section 306 permit on the ground of adverse effect. Since exclusion of evidence of beneficial use was correct, any request based upon the theory of beneficial use is not well-taken.

The challenge is based on a criterion that is irrelevant to the basis for a hearing under section 306. As such, the Department’s ruling was not clearly erroneous or arbitrary and capricious.

6. Administrative Findings and Conclusions

If findings of fact are not supported by substantial credible evidence, they are clearly erroneous. *Spence v. Ortloff*, 271 Mont. 533, ___, 898 P.2d 1232, 1233 (1995). Substantial credible evidence is “evidence which a reasonable mind might accept as adequate to support a conclusion.” *Satterfield v. Medlin*, 2002 MT 260, ¶23, 312 Mont. 234, ¶23, 59 P.3d 33, ¶24 (2002)(citing *Morgan v. Great Falls School District No. 1*,

2000 MT 28, ¶14, 298 Mont. 194, ¶14, 995 P.2d 422, ¶14 (2000)). Substantial evidence must be more than a scintilla, but may be less than a preponderance, of evidence.

Miller v. Frasure, 248 Mont. 132, 137, 809 P.2d 1257, 1261 (1991). If a review of the record leaves the reviewing court with the definite and firm conviction that a mistake has been committed, the lower court's findings are clearly erroneous. *Id.* Appellants carry the burden of showing prejudice from a clearly erroneous decision. *Terry v. Board of Regents of Higher Education*, 220 Mont. 214, 217, 714 P.2d 151, 153 (1986).

To be "arbitrary and capricious", the Supreme Court has stated that "review by a district court or this Court of an action under the 'arbitrary and capricious' standard does not permit a reversal merely because the record contains inconsistent evidence or evidence which might support a different result." *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, ___ (1993). Rather, the decision being challenged must appear to be "random, unreasonable or seemingly unmotivated, based on the existing record." *Id.*

Under § 2-4-704(2), MCA, a court reviewing an agency decision is statutorily barred from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. §2-4-704(2) MCA; see also: *Benjamin v. Anderson*, 2005 MT 23, ¶37, 327 Mont. 173, ¶37, 112 P.3d 1039, ¶37 (2005). If the Court determines that substantial credible evidence exists to support the findings of the trier of fact, it may not re-weigh the evidence, but must instead defer to the Hearing Examiner. *Id.* The Supreme Court has stated that "[a] hearing examiner, when one is used, is in the unique position of hearing and observing all testimony entered in the case. . . . The findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference." *Id.* (citations omitted).

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a. *Adverse Effects of Alteration, Diversion, Leakage and Design*

Petitioners argue that the *Final Order* erroneously failed to consider the adverse effects of the design and conditions of the Upper Pond which prevent “amounts of water” from reaching the Gollaher Reservoir. In particular, Petitioners claim error in that the conditions placed on the Pribyls do not require a measuring device to be placed on the Upper Pond.

Petitioners contend that the Department's ruling was clearly erroneous when it found that the overflow from the Upper Pond returned to the Willow Creek streambed. Finding of Fact No. 23. Petitioners state that testimony from their witness Bruce Anderson, a hydrologist, contradicts the Department's finding based on testimony from Moug and Irvin, and shows that the water from the Upper Pond would wash into a different drainage and not back to Willow Creek.

This Court cannot overturn the Department's Finding of Fact No. 23 simply because Petitioners presented testimony contrary to the finding. There is substantial credible evidence to support the Department's finding despite the fact that Petitioners presented testimony to the contrary. The Court finds that the Department not clearly in error in making Finding of Fact No. 23.

In addition, the Petitioners, with a broad stroke, then assert that Conditions A-F are erroneous because they do not address alleged design problems. The Court finds that the Petitioners made no objections to the Conditions in their exceptions to the *Proposal For Order* regarding the design or construction of the ponds. Neither did the Petitioners argue, in their exceptions, that a measuring device was a necessary condition. As such, the Department did not have the opportunity to fully explore the matter and the Petitioners have not exhausted their administrative remedies. The matter is not properly before the Court.

Even if the Petitioners had exhausted their administrative remedies, the Court finds that there was ample testimony about construction and design of the ponds before the Department. Petitioners counter that the Department erred when it did not require a measuring device as part of Condition E. The cases cited by the Petitioners regarding measuring devices were all brought pursuant to §§85-2-302 and 311 MCA. None of the cases support the proposition that a measuring device is a requirement for a stock pond permit upon a showing of any adverse effect.

In their *Reply Brief*, the Petitioners assert that the testimony of witness Bill Patton would have established that the leaks were more significant than the record shows and the Pribyls contend. p. 7. However, Patton's testimony on this issue was refused as being irrelevant to the issue of impact of leakage as an adverse effect. The Court cannot overturn a Department's factual finding based on potential evidence. Furthermore, the Petitioners did not raise the exclusion of Patton's testimony before the Department as an exception to the *Proposal for Order*. Thus, the Department did not have the opportunity to address the Hearing Examiner's evidentiary decision.

The Court finds that there was evidence before the Department as to the existence and extent of leakage, the current existence of weirs and adverse effect in the form of testimony by Irvin, Anderson, James Pribyl and Myrle Gollaher. Therefore, the Department, contrary to Petitioners' assertion, addressed the adverse effects of the condition of the Upper Pond on the Gollaher Reservoir. There was sufficient evidence from which the Department could develop conditions for the permits. The issue of Patton's potential testimony is not properly before the Court. It is not error for the Department to resolve the issue of leakage with a different remedy than the one requested by Petitioners. The stated remedy in Condition E is not clearly erroneous in light of the evidence presented. In light of the evidence, the Court will not disturb the conditions as set out by the Department.

b. *Depletion of Groundwater*

Petitioners allege that they showed the Department that the Pribyls' ponds take groundwater that would otherwise flow to the Gollaher Reservoir. They contend that the *Final Order* incorrectly ignored the issue of Willow Creek's subsurface flow. Petitioners have not designated which Finding or Conclusion is erroneous. Although not stated, it appears that Petitioners are referring to Finding of Fact No. 31 and Vandebosch's response to their exception regarding this finding on p. 7 of the *Final Order*.

The Department found that the issue of surface vs. subsurface flow was not at issue. The issue was whether water not diverted by the Pribyls would make it to the Gollaher Reservoir. See: *Final Order*, p. 7, and Conclusions of Law Nos. 6 and 16. The Department concluded that there was insufficient evidence to show that "if all the water above the Gollaher reservoir were left in Willow Creek, even when it is not running on the surface, it would make it to the Gollaher reservoir either above or below ground." Conclusions of Law Nos. 6, 16. The Department further concluded that, based on this lack of evidence, it could not find adverse effect. *Id.*

The Petitioners direct the Court to the testimony of Tommy Grimes, an "old-timer on the creek," who testified that Willow Creek did sometimes flow underground. HT, p. 106-109, *Petitioners' Reply Brief*, p. 8. Anderson testified that the surface and subsurface flows of Willow Creek were connected. HT, p. 125, l. 3-5.

Petitioners also point to *Montana Trout Unlimited v. Department of Natural Resources and Conservation*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (2006) for the proposition that surface and subsurface water are connected. The case deals with the exceptions to the Basin Closure Law with regard to groundwater. *Id.* at ¶43. It does not apply to stock ponds under section 306. The rest of the decisions Petitioners cite are equally inapplicable. All have been brought under sections 302 and 311. The cases

simply reiterate the connection between surface and subsurface flow in the context of a different statutory scheme. None stand for the proposition that a party need only show that surface and subsurface water are connected for the Department to make a finding of adverse effect. A party must provide more than a mere scintilla of evidence upon which an agency can base a finding of fact. The Petitioners have not.

Furthermore, a party may not raise a new legal theory on appeal. *Estate of Kindsfather*, 2005 MT 51, ¶34, 326 Mont. 192, ¶34, 108 P.3d 487, ¶34 (2005).

Petitioners contend that any lack of evidence on this issue could be laid at the Pribyls' feet because of their "intransigence" in allowing the Petitioners access. While Petitioners did raise an exception to the Department's consideration of subsurface flow, they did not argue the theory of lack of access. See *Objectors' Exceptions to Proposal for Decision*, p. 6. They cite to Tommy Grimes' testimony regarding the connection between the two and argue that hiring an expert to conduct tests regarding subsurface water would have been prohibitively expensive.

The theory of lack of access was not raised. The Department should have been given the chance to address the Petitioners' claim that access was a valid reason why they were unable to obtain sufficient evidence. Because the Department was not allowed the opportunity to address this issue on the Petitioners' theory of lack of access, the Court finds that this argument is not properly before it.

Therefore, the evidence and argument properly before the Court did not go beyond the existence of subsurface flows to the impact of subsurface flows. Again, there was testimony that the flows were connected but it went no further. The Department did not ignore the fact that Willow Creek flowed above and below ground. The Department was correct when it determined that it did not have sufficient evidence to differentiate between the effects of the surface and subsurface flow making the distinction between the two flows irrelevant. The Petitioners have not met their burden

of proof in this matter to provide substantial credible evidence to show that the subsurface flow was material. As such, the Department's order was not clearly erroneous in its findings or incorrect in its conclusions.

c. Transpiration and Evaporation

Petitioners contend that they presented evidence showing that the Pribyls stock ponds have increased the evaporation and transpiration losses in the drainage area. The Department's failure to consider such losses as an adverse effect was material error.

It appears that the Petitioners did not raise the issue of transpiration or evaporation in *Objectors' Exceptions to Proposal For Decision and Brief in Support*. The only reference to transpiration and evaporation can be found in their exception to Findings of Fact Nos. 13 and 31 in which the Petitioners acknowledge that not all the water "diverted upstream would end up at Gollahers" and that water would be lost to the prior water rights of other appropriators and transpiration and evaporation. *Objectors' Exceptions to Proposal For Decision and Brief in Support*, p. 6. Petitioners did not argue then, as they do on judicial review, that the Department erred when it did not consider these issues. Because the Petitioners did not afford the Department the opportunity to address this issue as fully as it has been presented on judicial review, the Court finds that this issue is not properly before the Court.

Even if the matter were properly raised, the Court would find that the Petitioners have failed to produce sufficient evidence for the Department to make any findings or conclusions. Bruce Anderson testified that the Upper Pond was not a terribly efficient way to store water based on its evaporative loss. HT. p. 126, ll. 19-22. Myrle Gollaher gave his opinion about the effect of evaporation on the Upper Pond. HT, p. 91, ll. 1-2.

The Petitioners cite to agency case *Application of Woods*, Case No. 41H-104667, 41H-G(W)12547, 6/10/00 for the proposition that intake and outflow

conveyances should be lined or covered by pipe to prevent evaporation and that evaporation should be replaced by some reduction in other uses. However, the Court notes that in *Woods*, the agency made the specific finding that the fish pond, not stock pond, was constructed on highly permeable soil.

The testimony shows that there could be evaporation or transpiration losses but goes no further to show the extent of such losses. The Petitioners did not meet their burden of proof to provide substantial credible evidence from which the Department could, in its discretion, make a reasonable finding regarding adverse effect. The Department did not err when it failed to consider evaporation or transpiration.

d. Year-Round Period of Use and Constant Call for Water

Petitioners assert that the Department's decisions to allow the Pribyls to have a period of use that is year-round and to ignore Petitioners' constant year-round need for water were arbitrary and capricious. They ask that the permits be revoked, or at the least amended to off-season diversion only. They contend that the testimony Petitioners proffered to show that the Pribyls filled their ponds in the summer was erroneously excluded based on the Department's finding of hearsay.

With regard to the evidentiary decision in Finding of Fact No. 36, the Court will not disturb the Department's decision and will defer to the Department which was in the best position to judge the credibility of the evidence offered. Simply because the rules of evidence do not apply to administrative hearings does not mean that a Hearing Examiner must allow testimony he deems unreliable hearsay testimony into the record. Furthermore, Petitioners attempted to introduce the testimony of a rebuttal witness through Myrle Gollaher. This witness, present for the hearing, had been released by the Petitioners' own counsel before testifying. HT, p. 191, ll.12-12-25, p. 192, ll. 1-14. The Petitioners had the opportunity to avoid hearsay testimony and did not. As such, the

Court finds that the Department's action was not erroneous or arbitrary and was not an abuse of discretion.

The Petitioners argue that "[t]he diversions, at any time of year, has (sic) an adverse effect on their prior rights." *Brief in Support of Amended Petitioner for Judicial Review*, p. 14. Certainly, the Petitioners do not have a constant call for water from Willow Creek when the water would not make it to them regardless of Pribyls' diversion. Petitioners have not provided sufficient evidence to show that the creek flows constantly to their property; indeed the evidence is to the contrary.

It is within the Department's discretion to decide how this issue of adverse effect should be resolved. In Condition A, the Department requires to Pribyls to cease diversion when the water could be used consistent with Petitioners' rights. The Petitioners fail to provide evidence that this condition, along with the others, which limit when Pribyls can divert, is insufficient to resolve the issue of adverse effect. The Department's decision to limit the Pribyls' diversion of water to instances when it will not adversely affect prior appropriators is not "random, unreasonable or seemingly unmotivated, based on the existing record."

Petitioners' claim that having to make an unreasonable number of calls for water is an adverse effect confuses limitations with compliance. The conditions of a stock pond permit cannot be constructed in anticipation of non-compliance. There is a statutory mechanism to resolve compliance problems and to amend water permits.

e. *Five-Day Waiting Period*

Petitioners argue that the Department's decision regarding the five day waiting period imposed on the Pribyls in the conditions of the *Final Order* was an arbitrary and capricious decision. Condition C of the *Final Order* requires the Pribyls to wait five days after water appears at the Lower Pond headgate to determine whether the water will flow to the Gollaher Reservoir. Condition D of the *Final Order* requires the Pribyls to

wait five days after water reached the headgate on the Upper Pond to see if the water has produced enough water to flow in Willow Creek to Petitioners' property downstream. If the water reaches Petitioners' property, the Pribyls must wait an additional 5 days to determine whether the water in Willow Creek will flow to the Gollaher Reservoir. *Final Order*, Condition D.

Myrle Gollaher testified that after the Pribyls closed their diversions in 2004 water flowed down Willow Creek and reached the Gollaher Reservoir within 5 days. HT. p. 60, ll. 4-6. Petitioners argue that Myrle did not testify that it would always take 5 days for water to flow to the Gollaher Reservoir. *Reply Brief*, p. 8. However, Myrle was never asked that question by counsel for the Pribyls or the Petitioners. The Petitioners had the opportunity get this information into evidence but, after reading the transcript, did not do so.

Petitioners contend that they were unable to produce sufficient evidence to show that the 5 day period was arbitrary and capricious because they were prohibited access to the Pribyls' property to gather information regarding a reasonable waiting period.

Petitioners did not raise the issue of access in their exceptions as a reason for Vandebosch to find the proposed Findings of Fact Nos. 11 and 29 were arbitrary. *Objectors' Exceptions to Proposal For Decision and Brief in Support*, p. 4. The Petitioners argue that Findings Nos. 11 and 29 were based on insufficient evidence. However, they never claim that the insufficient evidence was the result of lack of access to the ponds. They cite to other factors such as weather conditions and Kitson's right to irrigate.

The Department did not have the access argument before it as part of the claim that the 5 day period was arbitrary and, therefore, was not given the opportunity to address this issue in light of this added information. A party may not raise a new legal

theory on appeal. *Estate of Kindsfather*, 2005 MT 51, ¶34, 326 Mont. 192, ¶34, 108 P.3d 487, ¶34 (2005).

Even if this is properly before the Court, the *First Prehearing Order*, issued on May 25, 2004, sets the terms for discovery in the contested case. Petitioners did serve discovery requests on the Pribyls as evidenced by Exhibit B to the *Objectors; Reply Brief—Burden of Proof*. Petitioners could have issued discovery requests to get access to the property.

As such, the assertion that they had no access to the Pribyls' property or to information that could be used to set a more "realistic" time frame cannot stand. The only evidence before the Department from which it could reasonably determine what the timeframe should be came from one of the Petitioners himself. As such, the Department's decision regarding the 5 day waiting period was neither arbitrary nor capricious.

f. Definition of When Gollaher Reservoir is Full

Petitioners contend that the definition of when the Gollaher reservoir is "full" as found on page 9 of the *Final Order* is an arbitrary and erroneous finding. They have provided no evidence in the existing record to support their position. Instead the Petitioners state that additional evidence outside of the existing record would be necessary to show that the definition is incorrect. It is the Court's understanding that the Petitioners withdrew their request to include additional evidence at the oral argument. As such, the Court cannot rule on this matter and upholds the Department's finding.

g. Ruling on Other Appropriators' Water Rights

Petitioners allege that the discussion of the effects of the Pribyls' water use on other appropriators is incorrect and not supported by the evidence. They reference the *Final Order* but provide no citations to the particular portion of the order or to the record

to support their argument. However, the Department has already stipulated that another appropriator, Kitson, should be included in Condition D to the permit for the Upper Pond. The Department also states that this was the intent of the rest of the *Order* as evidenced by Conclusion of Law No. 17. The Court orders that Condition D of Permit No. 41QJ 30003071 be amended to reflect this stipulation.

To the extent that Petitioners seek further relief regarding other appropriators, the Court declines to rule since there are only Petitioners' bare allegations that are stated without any supporting evidence or references to the record.

h. Erroneous Conclusions of Law

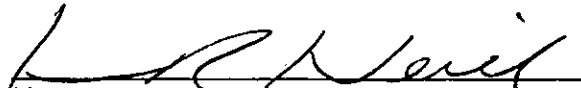
Petitioners have asserted that the Department erroneously concluded that the cases cited by Petitioners in their briefs and at the hearing do not apply to this case. Petitioners' point to page 3 of the *Final Order* to support their claim. However, after reading the cited text, this Court fails to see where the Department makes such a sweeping statement. The Petitioners have otherwise failed to discuss the cases that were allegedly ignored and how they should have been construed. It is the duty of the parties to bring the issues to the Court's attention on review and to provide citations to the record and to the law. Simply stating that the Department erroneously ignored all of their case law is overly broad. The Court will not perform the work of the parties. As such, the Court declines to address this issue.

IV. Conclusion

The Court finds that, with the exception of the stipulation to make a minor change to Condition D in the Permit for the Upper Pond, the Petitioners have not met their burden to show that the Department's decisions were clearly erroneous, arbitrary and capricious or incorrect.

THEREFORE, IT IS HEREBY ORDERED that the Petitioners' *Petition for Judicial Review* is DENIED in PART and GRANTED in part.

DATED this 7th day of March, 2007.


Kenneth R. Neill, District Court Judge

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